IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL MISCELLANEOUS APPLICATION NO. 220 OF 2004.

Shamsundar Anchan,
716/13, Yashmira Apartment,
La Campal Colony,
Miramar – Goa. ..... Applicant.

Versus

State,
(Through P.I. attached to Old Goa
Police Station). ..... Respondent.

Shri Menino Teles with Ms. Elsa Fernandes, Advocate for the Applicant.

Shri S. N. Sardessai, Public Prosecutor for the State.

CORAM : N. A. BRITTO, J.

DATE : 29th OCTOBER, 2004.

ORAL ORDER :

1. The applicant herein is one of the 3 accused , the other 2 being juveniles, in Crime No. 56 of 2004 of Old Goa Police Station registered under sections 394, 302 read with section 34 of the I.P.C.

2. The applicant's application for bail was first rejected by the Learned Sessions Judge, Panaji, by order dated 20.07.04 and again by order dated 14.09.04.

3. At present I am informed that the case has already been filed and has been committed to the Court of Sessions, Panaji.

4. The facts stated on behalf of the Police show that Vithal Anant Naik who was working in the Electricity Department as an Assistant Linesman on his way back home on 14.05.04, after 20.05 hours was robbed and murdered. As he was late in coming home, a missing report was lodged and when his brother went in his search, he found the dead body near Old Bal Niketan and his scooter, a black colour Honda Activa bearing No. GA-03-A-5076 and a wrist watch missing. Subsequently, post mortem examination confirmed that the death of Vithal Anant Naik, aged about 36 years was due to damage to the head and brain associated with fractures of ribs as a result of strong force and/or object and/or surface associated with incised injuries at the neck front caused by sharp weapon which were ante-mortem and fresh at the time of death. The post mortem report also mentioned that the damage to the head, brain, ribs were all fatal in the ordinary course of nature.

5. The applicant was arrested on 3.6.04 and a charge sheet against him was filed on 2.9.04. The applicant filed a bail application on 3.9.04 which, as already stated, came to be dismissed by order dated 14.09.04 of the Learned Sessions Judge, Panaji.

6. The first ground taken on behalf of the applicant by Learned

Advocate Shri Teles is that the applicant was entitled for bail on default under secction 167 (2) (a) (i) of the Code of Criminal Procedure, 1973 (Code, for short). Shri Teles in support of the said submission has placed reliance on the cases of Dharmanand @ Mahato v/s State, 1994(1) CRIMES 397 and Rajnikant Jivanlal Patel and Another v/s Intelligence Officer, Narcotic Control Bureau, New Delhi, AIR (1990) SC 71.

7. The Supreme Court in the case of Rajnikant Jivanlal Patel and Another (supra) stated that :

> "an order for release on bail under proviso (a) to section 167(2) may appropriately be termed as an order-on-default. It is a release on bail on the default of the prosecution in filing charge sheet within the prescribed period. The right to bail under section 167 (2) proviso (a) thereto is absolute. It is a legislative command and not Courts discretion. If the investigating agency fails to file charge sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds. "

8. Drawing inspiration, if I may use that expression from the case of Rajnikant Jivanlal Patel and Another(supra), a Learned Single Judge of the Allahabad High Court in the case of Dharmanand @ Mahato (supra) and other cases came to the same conclusion that :

> "In terms of section 167 (2) proviso (a) of the Code and various case laws on the point, the right of the accused to be released on bail if the charge sheet is not filed within a period of 90/60 days, as the case may be, is absolute and cannot be defeated or taken away on subsequent filing of charge sheet or by remand under section 309 (2) of the Code. The right to bail in such a case continues till the accused is released on his furnishing bail bonds, etc. In default of non-filing of charge sheet by the prosecution within the prescribed period, the Magistrate should pass an order enlarging the accused on bail, irrespective of the fact whether an application for bail is or is not moved by the accused and should call upon the accused to furnish bail bonds. If the accused is prepared and does furnish bail then he has to be released on bail. If the accused fails to furnish bail bonds, then only he should be remanded under the provisions of section 309 (2) of the Code. But if after remand the accused furnishes bail bonds, even after receipt of charge sheet, then he has to be released from the custody because the order of bail survives even after filing of charge sheet. The Magistrate cannot detain an accused in custody on furnishing bail bonds. The Magistrate has to follow the provisions strictly if the accused furnishes bail bonds."

9. Shri Sardessai, the Learned P.P. has opposed the grant of bail on default to the applicant and has submitted that the aforesaid two decisions do not represent the correct state of law on the subject. Shri Sardessai has placed reliance on the cases of Sanjay Dutt v/s State, (1994) 5 SCC 410 and Mohamed Iqbal Madar Sheikh and Others v/s State of Maharashtra, (1996) 1 SCC 722.

10. In the case of Sanjay Dutt (supra), the Constitution Bench of

the Hon'ble Supreme Court stated that :

> " The 'indefeasible right' of the accused to be released on bail in accordance with section 20(4)(bb) of the TADA Act read with section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage."

11. In the case of Mohamed Iqbal Madar Sheikh and Others (supra), the Supreme Court stated that :

> " It is now stated that this right (the right to be released on bail under proviso (a) to section 167(2) of the Code read with section 20(4)(b) of the TADA) cannot be exercised after the charge sheet has been submitted and cognizance has been taken, because in that event the remand of the accused concerned including one who is alleged to have committed an offence under TADA, is not under section 167(2) but under other provisions of the Code."

The Court therefore concluded that it was not open to the appellant to claim bail under proviso (a) to section 167(2) of the Code because the charge sheet was already submitted and they were in custody on the basis of the order passed under other provisions of the Code and therefore the proviso (a) to section 167(2) is not applicable. In my view, since the last observation of the Supreme Court is the last word on the subject, the applicant was not entitled for bail on default, the charge sheet having been filed against him on 2.09.04 and he having been remanded to custody under other provisions of the Code.

12. Regarding the merits of the case, Shri Teles, the Learned Advocate for the applicant has submitted that the case of the prosecution is based only on the circumstantial evidence and the only circumstance which is sought to connect the accused with the alleged incident is the recovery of a knife. On the other hand, Shri Sardessai, the Learned P.P. has placed the case papers for my perusal and has submitted that, that is not the only circumstance with which the accused is sought to be connected with robbery / murder of the said deceased. According to Shri Sardessai, the Learned P.P., the applicant has also admitted the offence before the Medical Officer and that the applicant was also found involved in the sale of the scooter which was taken away from the said deceased.

13. Indeed, the case papers do show that the applicant was medically examined on the same day he was arrested i.e. on 3.06.04

and was found with an injury on the right index finger and he has made certain admissions to the doctor as regards the cause of the said injury which are certainly relevant circumstances. The record also shows that the applicant was involved in the sale of the said scooter and besides blood and mud stained knife has been recovered at his instance. Another piece of evidence collected against the applicant is the seizure of his blood stained clothes. The circumstantial evidence so collected shows that the applicant is involved in a very serious offence, punishment for which can be of the highest magnitude. When such is the case, the Courts are bound to presume that no amount of bail would secure the presence of the accused at the trial in case the accused is admitted to bail. The fact that the accused is a resident of the locality is no consideration in such a situation.

14. In my view, the application should fail on both the counts. In other words, the applicant is not entitled to bail either on default or on merits at this stage.

15. The application is therefore hereby rejected.

N. A. BRITTO, J.

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